UNITED STATES GOVERNMENT BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

CASE NOS. 12-CA-19668, et al.

GOYA FOODS	OF F	LORI	DA,	INC	٠,

Petitioner,

v.

SOUTHERN REGIONAL JOINT BOARD, WORKERS UNITED, a/w SEIU

Respondent.	

PETITIONER'S AMENDED EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

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AND

Carlos G. Ortiz, Esquire General Counsel Goya Foods, Inc. 100 Seaview Drive Secaucus, New Jersey 07096 carlos.ortiz@goya.com (800) 631-3104 (Telephone) Co-Counsel for Petitioner Respondent, GOYA FOODS OF FLORIDA ("Goya"), through its counsel, Bryant Miller Olive, and Carlos G. Ortiz, pursuant to Section 101.11(b) of the Statements of Procedure and Section 102.46 of the Rules and Regulations of the National Labor Relations Board, files these Exceptions to Decision of Administrative Law Judge dated March 21, 2011, service of which was made with the Order Transferring Proceeding to the National Labor Relations Board of the same date.¹

Goya directs these Exceptions specifically to the judge's findings, conclusions, and recommendations, as set forth below with references to the specific pages and lines of the Decision. Upon the grounds, testimony, and evidence and for the reasons set forth in Goya's Brief, and for additional grounds as set forth below, Goya's Exceptions are as follows:

- 1. The judge erred in her findings of fact, as set forth on page 2, lines 7-8, 11-12, 15-34 and on page 3, lines 2-5, 8-15; in footnote 8 on page 11, lines 49-51, relating to Humberto Galvez and/or Reinaldo Bravo. In support of this exception, Goya refers the Board to General Counsel's Exhibit 1(f), the Compliance Specification.²
- 2. The judge erred in her findings of fact, as set forth in footnotes 2, 3 and 4 on page 2, lines 36-51; on page 3, lines 45-51; and on page 5, lines 25-29 and 43-45, relating to Goya cases other than the instant case and that occurred later than the instant case. Goya refers the Board to GC 1(f).

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Goya is filing concurrently herewith its Brief in Support of Exceptions to Decision of Administrative Law Judge, pursuant to Section 102.46 of the Rules and Regulations. Accordingly, argument and citation to authority is contained therein and omitted from these Exceptions.

The Transcript of the hearing shall be cited herein by page and line, e.g., "Tr. 1:1." Goya's exhibits shall be hereafter referred to and cited by party initial and number, e.g., "R 1." Counsel for the General Counsel's exhibits shall be referred to and cited by party initial and number, e.g., "GC 1."

- 3. The judge erred in her conclusion of law, as set forth on page 4, lines 11-13, that the issue in this matter involves the validity of the private settlement agreements. In support of this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's conclusion is not warranted by controlling law and the facts of this case.
- 4. The judge erred in failing to find that witness Alberto Turienzo exhibited a better understanding of English than he claimed and, therefore, discrediting his testimony on that and other bases. Goya refers the Board to the proceedings including but not limited to those recorded at Tr. 165, 258-59, and 341-43 and those cited in the Brief.
- 5. The judge erred in her finding of fact, as set forth on page 6, lines 21-23, in which she summarizes and characterizes witness Jesus Martin's testimony relating to contacting the union. Goya refers the Board to testimony including but not limited to that set forth on pages Tr. 244 and that cited in the Brief.
- 6. The judge erred in failing to find that witness Turienzo was aware of the settlement discussions with Goya long before the meeting in which he signed a settlement agreement and that his testimony should therefore be discredited. Goya refers the Board to testimony including but not limited to that set forth on pages Tr. 242-43 and 245-49 and that cited in the Brief.
- 7. The judge erred in failing to discredit Martin's testimony based on his claim that he did not contact the union because he believed Francisco Unanue, as set forth at page 6, lines 28-30. Goya refers the Board to testimony including but not limited to that set forth on pages Tr. 244 and 261 and that cited in the Brief.
- 8. The judge erred in her findings of fact, as set forth on page 6, lines 35 through page 7, line 18, relating to "[t]he involvement of employee Gilberto Torres." Goya refers the

Board to the Decision at page 15, lines 8-42; to testimony including but not limited to that set forth on pages Tr. 237, 258, 277, 375-76, and 394; and R 5(a) – (u).

- 9. The judge erred in failing to discredit Turienzo's testimony based on his claim, both implicit and explicit, that he was initially contacted regarding the settlement only one or two days before he signed it, as set forth on page 7, lines 22-23. Goya refers the Board to testimony including but not limited to that set forth on pages Tr. 242-43 and 245-49 and that cited in the Brief.
- 10. The judge erred in failing to discredit Turienzo's entire testimony relating to alleged misrepresentations by Goya managers as incredible on its face, as set forth on page 7, line 27 through page 8, line 4. Goya refers the Board to testimony including but not limited to that set forth on pages Tr. 95-97, 113, 127-49, 170-71, 301-11, 314-15, and 356-67 and that cited in the Brief.
- 11. The judge erred in failing to credit the testimony of Robert and Francisco Unanue, as set forth on page 8, line 8 to page 9, line 35. Goya refers the Board to testimony including but not limited to that set forth on pages Tr. 68-97, 107-113, 296-348, 352-72, and 375-396 and that cited in the Brief.
- 12. The judge erred in her conclusion of law, as set forth on page 12, lines 11-17, that the first factor of the *Independent Stave* analysis (whether the parties have agreed to be bound and the general counsel's position) weighs against Goya. In support of this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's conclusion is not warranted by controlling law and the facts of this case.
- 13. The judge erred in her analysis, as set forth on page 12, lines 26-42, wherein she correctly reasons that the second *Independent Stave* factor must not be judged in hindsight, but

then details facts that have no purpose other than to judge in hindsight and which prejudiced Goya by their inclusion. In support of this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's conclusion is not warranted by controlling law and the facts of this case.

- 14. The judge errs in her conclusion of law, as set forth on page 14, lines 13-14, that the second factor of the *Independent Stave* analysis (reasonableness of the settlements) weighs against Goya. In support of this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's conclusion is not warranted by controlling law and the facts of this case.
- 15. The judge errs in her conclusion of law and fact, as set forth on page 14, at line 14 through page 18, line 9, to credit the testimony of Turienzo and Martin and not to credit the testimony of Robert and Francisco Unanue. In support of this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's conclusion is not warranted by controlling law and the facts of this case.
- 16. The judge errs in her findings of fact, as set forth on page 15, lines 8-42, relating to Gilberto Torres. Goya refers the Board to the Decision at page 15, lines 38-39; to testimony including but not limited to that set forth on pages Tr. 375-396; and R 5(a) (u).
- 17. The judge errs in her findings of fact, as set forth on page 15, lines 44-47, that Goya made misrepresentations. Goya refers the Board to testimony including but not limited to that set forth on pages Tr. 300-21, 352-66 and that cited in the Brief.
- 18. The judge erred in crediting witnesses Turienzo and Martin over Robert and Francisco Unanue, as set forth from page 16, line 8 through page 17, line 12 and page 18, lines

- 6-8. Goya refers the Board to testimony including but not limited to that set forth on pages Tr. 300-21 and 352-66 and that cited in the Brief.
- 19. The judge erred in her conclusion of law, as set forth on page 18, lines 7-9, that the third factor of the *Independent Stave* analysis (whether there was fraud, coercion, or duress) weighs against Goya. In support of this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's conclusion is not warranted by controlling law and the facts of this case.
- 20. The judge erred in her conclusion of law, as set forth on page 20, lines 10-16, that the terms of the settlements were repugnant to the Act. In support of this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's conclusion is not warranted by controlling law and the facts of this case.
- 21. The judge erred in her conclusion of law, as set forth on page 20, lines 20-26, that the fourth factor of the *Independent Stave* analysis (whether the employer had a history of violations), did not weigh more heavily in favor of Goya. In support of this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's conclusion is not warranted by controlling law and the facts of this case.
- 22. The judge erred in her conclusions of law, as set forth on page 20, lines 30-34, that the settlements are insufficient to waive reinstatement or toll back pay for Turienzo and Martin, that they are repugnant to the Act, and that she should be rejected. In support of this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's conclusion is not warranted by controlling law and the facts of this case.
- 23. The judge erred in her conclusion of law, as set forth on page 23, lines 37-38, that *Drukker Communications v. NLRB*, 700 F.2d 727 (D.C. Cir. 1983), is inapposite. In support of

this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's conclusion is not warranted by controlling law and the facts of this case.

- 24. The judge erred in her conclusion of law, as set forth on page 23, line 50, through page 24, line 1, and page 24, lines 8-9, that the testimony of Arturo Ross would not have pertained to matters central to this case. In support of this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's conclusion is not warranted by controlling law and the facts of this case.
- 25. The judge erred in her finding of fact, as set forth on page 23, lines 47-51, that there was no basis to conclude that Turienzo would have shared with Ross aspects of the proposed settlement. Goya refers the Board to the proffer of testimony in R1 and R2 and in the Transcript at pages 41-47 and 282, and as explained and argued in the Brief.
- 26. The judge erred in her conclusion of law, as set forth on page 25, lines 41-42, that she was correct to grant counsel for the general counsel's motion to revoke Goya's subpoena to Ross, to deny Goya's motion for reconsideration of that ruling, and to reaffirm that ruling in her Decision.
- 27. The judge erred in her conclusion of law to deny Goya's motion to dismiss the specification, made at the close of counsel for the general counsel's case in chief. The judge failed to record her ruling in her Decision. Goya refers the Board to the record at page Tr. 203-07 and the argument in the Brief.
- 28. The judge erred in her failure to draw an adverse inference against counsel for the general counsel on the basis that Reinaldo Bravo and Humberto Galvez were not called by counsel for the general counsel to testify regarding the negotiations for the settlements. Goya

avers that the authority cited and arguments presented in the Brief establish that the judge's recommendation is not warranted by controlling law and the facts of this case.

29. The judge erred in her entire recommended order, as set forth on page 26, lines 17-18. In support of this exception, Goya avers that the authority cited and arguments presented in the Brief establish that the judge's recommendation is not warranted by controlling law and the facts of this case.

Respectfully submitted,

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By /s/ David C. Miller

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AND

Carlos G. Ortiz, Esquire General Counsel Goya Foods, Inc. 100 Seaview Drive Secaucus, New Jersey 07096 carlos.ortiz@goya.com (800) 631-3104 (Telephone) Co-Counsel for Petitioner **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by

U.S. Mail to Susy Kucera, Esquire, Counsel for the General Counsel, National Labor Relations

Board, Region 12, Miami Resident Office, 51 S.W. 1st Avenue, Room 1320, Miami, Florida

33130 and to Ira J. Katz, Esquire, Workers United, 31 West 15 Street, New York, New York

10011, this 18th day of April, 2011.

/s/David C. Miller

David C. Miller